Filed 9/21/06 In re Marlon R. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MARLON R., a Person Coming Under the Juvenile Court Law.	B189523 (Super. Ct. No. CK52794)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CHARLES N., Defendant and Appellant.	

APPEAL from an order of the Superior Court for Los Angeles County. David S. Milton, Judge. Reversed and remanded with directions.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

Charles N. (father) appeals from the juvenile court's order terminating his parental rights to his three-and-a-half-year-old son. His sole contention on appeal is the juvenile court erred in finding the Department of Children and Family Services (DCFS) complied with the notice requirements of the Indian Child Welfare Act (ICWA).[1] We agree with his contention. Accordingly, we reverse the order and remand the matter to the juvenile court with directions.

FACTS AND PROCEEDINGS BELOW

In September 2003, DCFS filed a petition under Welfare and Institutions Code section 300 concerning 15-month-old Marlon R. The petition alleged father was "unable to provide [Marlon] with the necessities of life including but not limited to appropriate, safe and stable housing."[2] Marlon was placed in foster care.

In its report for the September 30, 2003 detention hearing, DCFS stated the ICWA "does or may apply." The social worker reported he "was unable to make any inquiries or contact with [Marlon]'s parents . . . regarding American Indian Heritage." At the detention hearing, the juvenile court inquired whether "anybody ha[d] any American Indian Heritage." Father's counsel said there was none on his side of the family. Mother's counsel stated, "Mother says she may have some but it's so back [*sic*] it would be relatively small." Marlon's counsel pointed out some of the "maternal relatives" were present if the juvenile court wanted to inquire further.

The juvenile court asked if these relatives were "aware of any American Indian Heritage." Marlon's maternal grandmother informed the court somewhere in the family's history there was an affiliation with "the tribe Creek." The juvenile court asked the grandmother to state and spell her name, and give her date and place of birth. The

---

[1] 25 United States Code section 1901 et seq.

[2] Marlon's mother, Megan R., is not a party to this appeal so we will not set forth the facts concerning the case against her. We will state only the facts relevant to the one issue before this court on appeal.

grandmother provided this information on the record. Thereafter, the court stated: "Maternal grandmother, it would be helpful if you could get as much information on the person who may have the Creek ancestry because we need to provide the family tree so the Creek Tribe can take a look at it and tell us whether or not a federal law, the Indian Child Welfare Act, applies. So it would be very helpful to have that information. So if you could talk to your other relatives and find out, that would be great." The juvenile court ordered DCFS "to notice the Bureau of Indian Affairs and the Creek Indian Tribe to determine if this case falls within the Indian Child Welfare Act."

At the disposition hearing on October 28, 2003, the juvenile court sustained an amended petition alleging father "has a history of illicit drug abuse and is a frequent user of illicit substances which renders the child's father incapable of providing regular care for the child." The court declared Marlon to be a dependent of the court, ordered Marlon to remain suitably placed in foster care and ordered family reunification services.

Also at the disposition hearing, the juvenile court stated the following regarding ICWA notice: "I do not have any Indian notices. They just did not do it. So the Department needs to properly do that. It was the Creek Tribe, maternal grandmother. I'm going to impose and stay $250 in sanctions if it's not done correctly. They need to have that. I already obtained information about date of birth for the grandmother and her place of birth." The court ordered DCFS to give notice to the Creek Tribe and the Bureau of Indian affairs (BIA) by November 24, 2003 or DCFS would have to pay the sanctions.

On November 24, 2003, DCFS filed the ICWA notices it had served on the BIA and five tribes. It also filed return receipts from two of the tribes evidencing service by certified mail, and responses DCFS received from two other tribes and the BIA.[3] The BIA stated DCFS had provided "[i]nsufficient information identifying a federally recognized tribe." The two tribes which responded to the notices did not identify Marlon as an "Indian child" within the meaning of the ICWA based upon the information

---

[3] There was only one tribe for which DCFS did not file either a return receipt or a response to its ICWA notice.

provided by DCFS (names, birthdates and birthplaces of Marlon and his mother and father).

At the hearing held on November 24, the juvenile court found the ICWA notices were "not proper" because they did not identify "the person of Indian ancestry, the maternal grandmother."[4] The court stated her date and place of birth for the record and reiterated "she was claiming heritage in the Creek Tribe."[5] The court lifted the stay on the monetary sanction previously imposed, and ordered DCFS to pay the $250 within five court days. The court also imposed another $250 sanction, but stayed it until a further hearing to be held on December 23, 2003.

On or about December 1, 2003, DCFS paid the $250 sanction. In an interim review report prepared for the December 23, 2003 hearing, DCFS stated, "The Indian Child Welfare Act does not apply." DCFS filed the second set of ICWA notices it served on the BIA and the five tribes, purportedly by certified mail with return receipt requested. On Form 318, DCFS included the maternal grandmother's name, birthdate and tribal affiliation, but listed her birthplace as "unknown," even though this latter information was stated in open court at two prior hearings. To the extent DCFS received return receipts or responses from the BIA or any of the five tribes, DCFS did not file these documents.

At the December 23, 2003 hearing, the juvenile court stated: "The matter is here for Indian notices. I do have the notice to the Indian tribes. It is proper. It contains the name of the person with the suspected Indian heritage, and it's timely. [¶] I have not received a response from any of the tribes or the Bureau of Indian Affairs. If I receive . . . a response indicating it falls under the [ICWA], I will recall the matter and apply

---

[4] Form SOC 318 entitled "Request for Confirmation of Child's Status as Indian," which DCFS sent to the BIA and the five tribes, includes spaces for listing the maternal grandmother's name, birthdate, birthplace and tribal affiliation.

[5] In its November 24, 2003 minute order, the juvenile court stated the ICWA notices must "include the names and birthdates of relatives with Indian ancestry."

that." The court issued a minute order stating "this case does not fall under the Indian Child Welfare Act at this time."

Father did not comply with his case plan. He failed to appear for drug tests and did not enroll in a drug rehabilitation program as ordered. On March 24, 2005, the juvenile court terminated father's and mother's reunification services. On February 28, 2006, the court terminated father's and mother's parental rights. The court found Marlon was adoptable, father's and mother's visitation "ha[d] not been regular and consistent," and "it would not be detrimental to Marlon to terminate parental rights."

DISCUSSION

Father contends the juvenile court erred in finding DCFS complied with the notice requirements of the ICWA. Father argues the notices were insufficient because they did not include all information about the heritage which was "known and readily available." Father also argues there was no proof "the notices were sent as required by the ICWA" given DCFS did not file return receipts or responses indicating the BIA and the tribes "actually received the [second set of] notices." Because father asserts notice was improper, he also argues the juvenile court erred in concluding the ICWA did not apply to this case. DCFS responds, arguing the record shows it provided notice to the BIA and the Creek Tribe by the proper method and the notices contained "enough information to be meaningful."[6]

---

[6] Although DCFS does not assert this issue on appeal, we note "the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court" or "by the parent's failure to appeal the claimed error at the earliest opportunity." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *In re Jennifer A.* (2003) 103 Cal.App.4th 692, 707; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259-260.) "The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

The ICWA is designed "to protect the interests of the Indian child" and "to promote the stability and security of Indian tribes and families."[7] It sets forth the manner in which a tribe may obtain jurisdiction over child custody proceedings involving an "Indian child" or intervene in the state court proceedings.[8] The notice requirements of the ICWA ensure a tribe will have "the opportunity to assert its rights" under the statute.[9]

Section 1912, subdivision (a) of the ICWA sets forth the following requirements for proper notice: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ."

"Since the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed."[10] California courts have concluded, "The failure to comply with the notice requirements of the ICWA constitutes prejudicial error unless the tribe has participated in or indicated no interest in the proceedings."[11]

---

[7] *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.

[8] *In re Kahlen W., supra,* 233 Cal.App.3d at page 1421.

[9] *In re Kahlen W., supra,* 233 Cal.App.3d at page 1421.

[10] *In re Samuel P., supra*, 99 Cal.App.4th at page 1267; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.

[11] *In re Samuel P., supra*, 99 Cal.App.4th at page 1265; *In re H.A.* (2002) 103 Cal.App.4th 1206, 1213.

As a threshold matter we note, "Like other California courts, we are 'persuaded that insofar as the ICWA notice provisions are concerned, the [BIA] guidelines "represent a correct interpretation of the [ICWA]."'"[12] "'Although the Guidelines do not have a binding effect on this court, the construction of a statute by the executive department charged with its administration is entitled to great weight.'"[13]

"Notice under the ICWA must, of course, contain enough information to constitute meaningful notice."[14] "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the one with the alleged Indian heritage."[15] In *In re C.D.*, this court held notice to a tribe under the ICWA must include "the information set forth in the BIA Guidelines at 25 Code of Federal Regulations part 23.11(d)(3), if such information is known."[16] This provision of the Code of Federal Regulations states notice to a tribe "shall include the following information, if known": "All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents, and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; *places of birth* and death; tribal enrollment numbers, and/or other identifying information."[17] In *In re C.D.*, this court explained DCFS "has a duty to inquire about and

---

[12] *In re C.D.* (2003) 110 Cal.App.4th 214, 224-225, quoting *Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at page 255.

[13] *In re C.D.*, *supra*, 110 Cal.App.4th at page 224, quoting *In re H.A.*, *supra*, 103 Cal.App.4th at page 1211.

[14] *In re Karla C.* (2003) 113 Cal.App.4th 166, 175; *In re Louis S.* (2004) 117 Cal.App.4th 622, 630.

[15] *In re Francisco W.*, *supra*, 139 Cal.App.4th at page 703.

[16] *In re C.D.*, *supra*, 110 Cal.App.4th at page 225; see also *In re Louis S.*, *supra*, 117 Cal.App.4th at page 630; *In re Francisco W.*, *supra*, 139 Cal.App.4th at page 703.

[17] 25 Code of Federal Regulations part 23.11(d)(3), italics added.

obtain, if possible, all of the information about a child's family history included . . . in 25 Code of Federal Regulations part 23.1(d)(3)."[18]

"Moreover, the Guidelines require that an original or a copy of each ICWA notice be filed with the juvenile court along with any return receipts."[19] "Most appellate courts considering the issue have held the ICWA notice, and return receipts and responses of the [BIA] or tribe, if any, must be filed with the juvenile court,"[20] even though neither the ICWA itself nor California Rules of Court rule 1439 imposed such a requirement at the time the cases were decided.[21] Today -- but not at the time DCFS prepared, served and filed its notices -- rule 1439 requires DCFS to file with the juvenile court "copies of notices sent and all return receipts and responses received."[22]

Based on the totality of the circumstances revealed in the record in this case, we find the juvenile court erred when it decided DCFS complied with the notice requirements of the ICWA. We are concerned here only with the second set of ICWA notices DCFS filed in advance of the December 23, 2003 hearing. Our finding of error is based on several factors.

First, DCFS listed the maternal grandmother's birthplace as "unknown" in the ICWA notices, even though this information had been provided in open court at two prior

---

[18] *In re C.D.*, *supra*, 110 Cal.App.4th at page 225; see also *In re Louis S.*, *supra*, 117 Cal.App.4th at page 630.

[19] *In re Karla C.*, *supra*, 113 Cal.App.4th at page 175, citing The Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed.Reg. 67588 (Nov. 26, 1979)).

[20] *In re Karla C.*, *supra*, 113 Cal.App.4th at pages 175-176; see, e.g., *In re I.G.* (2005) 133 Cal.App.4th 1246, 1252; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 247, 259; *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906 ("the requirement [of filing the return receipts and responses] has been adopted by our courts"); *In re Louis S.*, *supra*, 117 Cal.App.4th at page 629; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 232 ("the trial court was not provided with copies of the notices the Department sent or the return receipts (if any) it received. Thus, there is insufficient evidence that two of the tribes – the tribes that failed to respond – received actual notice"); *In re Marinna J.*, *supra*, 90 Cal.App.4th at pages 739-740, footnote 4.

[21] *In re L.B.* (2003) 110 Cal.App.4th 1420, 1425, footnote 3.

[22] California Rules of Court, rule 1439(f).

hearings. Other than mother, the maternal grandmother was the only relative identified with Indian heritage. As discussed above, this court and other courts have explained DCFS must provide the maternal grandmother's place of birth (as well as the other information set forth in the BIA Guidelines at 25 Code of Federal Regulations part 23.11(d)(3)) in its ICWA notice if such information is known.[23]

Second, DCFS's duty to provide the tribes with information about Marlon's Indian heritage was broader than just recording whatever information happened to be disclosed at court hearings. DCFS also had "a duty to inquire about and obtain, if possible, all of the information about [the] child's family history included . . . in 25 Code of Federal Regulations part 23.1(d)(3)."[24] At the September 30, 2003 detention hearing, the juvenile court asked the maternal grandmother to try to gather information from her relatives about her family's Creek heritage. The record does not show DCFS or the juvenile court ever pursued further this potentially significant avenue to obtain additional information.

Finally, DCFS did not file any return receipts or responses showing the BIA or any of the five tribes received the second set of notices. DCFS never stated in a report or at a hearing whether it received any return receipts or responses after it served its second set of notices. Despite these several omissions in the information DCFS provided, the juvenile court failed to inquire further into these matters.

Nothing we have said should be construed to mean any one of the omissions identified above *by itself* would necessarily indicate insufficient notice under the ICWA. But here we have missing biographical information about a relative with Indian heritage, which was known to DCFS at the time it served its notice. Based on the record, it appears DCFS shirked its duty of inquiry and failed to follow up with the maternal grandmother in an effort to obtain additional information which, if known, was required for sufficient notice to the tribes (names, birthdates and birthplaces of other relatives with

---

[23] *In re C.D.*, *supra*, 110 Cal.App.4th at page 225; *In re Louis S.*, *supra*, 117 Cal.App.4th at page 631; *In re Francisco W.*, *supra*, 139 Cal.App.4th at page 703.

[24] *In re C.D.*, *supra*, 110 Cal.App.4th at page 225; see also *In re Louis S.*, *supra*, 117 Cal.App.4th at page 630.

Indian heritage). DCFS did not file any return receipts or responses from the BIA or the tribes showing actual receipt of the second set of notices or inform the juvenile court whether it did or did not receive such documents from the BIA or the tribes.[25]

Because the juvenile court did not ask DCFS if it had made any effort to obtain further information from the maternal grandmother, or if it had received return receipts or responses from the BIA or any of the tribes, we find the juvenile court did not have sufficient information before it to make a proper determination about whether DCFS complied with the notice requirements of the ICWA. "While the petitioning agency [DCFS in this case] may have the duty to provide ICWA notice, it is the role of the juvenile court, not the agency to determine whether the ICWA notice is proper."[26]

For all of these reasons, we conclude the juvenile court erred when it decided DCFS complied with the notice requirements of the ICWA and the ICWA did not apply to this case. We reverse the order terminating parental rights to allow DCFS to comply with the notice requirements of the ICWA, and the juvenile court to determine whether the ICWA applies to this case. Based on prevailing case law, father concedes this type of limited remand is appropriate here.[27] If, after proper notice to the Creek tribe, the juvenile court determines Marlon is not an Indian child within the meaning of the ICWA, the order terminating parental rights will be reinstated.

---

[25] See *In re Jennifer A.*, *supra*, 103 Cal.App.4th at pages 703, 705 (notice requirements of the ICWA not met where "[n]o evidence regarding notice, receipt of notice, or any responses from the tribes or the BIA was provided to the juvenile court" and the record established the agency failed to inform the tribes about the birthplaces of the dependent child, the mother and the father).

[26] *In re Nikki R.*, *supra*, 106 Cal.App.4th at page 852; see also *In re Jennifer A.*, *supra*, 103 Cal.App.4th at page 705.

[27] See *In re Francisco W.*, *supra*, 139 Cal.App.4th at page 710.

DISPOSITION

The order terminating father's and mother's parental rights is reversed and the cause is remanded to the juvenile court with directions (1) to order DCFS to comply with the notice requirements of the ICWA in accordance with the views expressed in this opinion and (2) to conduct such further proceedings as are necessary to establish full compliance with the notice requirements of the ICWA. If, after receiving proper notice under the ICWA, a Creek tribe determines Marlon is an Indian child within the meaning of the ICWA, the juvenile court shall proceed in conformity with all provisions of the ICWA. If, on the other hand, no response is received from a Creek tribe indicating Marlon is an Indian child, or responses received indicate Marlon is not an Indian child within the meaning of the ICWA, the order terminating parental rights shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.